

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**ANDREA WEISENBORN, A
PARTIALLY INCAPACITATED AND
TOTALLY DISABLED INDIVIDUAL,
BY AND THROUGH DEBBIE SHOEMAKER
AND JIM SHOEMAKER, HER PARENTS
AND NEXT FRIENDS**

RESPONDENT,

v.

**MISSOURI DEPARTMENT OF MENTAL
HEALTH, DR. KEITH SCHAFER, DIRECTOR,
MISSOURI DEPARTMENT OF MENTAL
HEALTH, SUED IN HIS OFFICIAL CAPACITY,
LINDA BOWERS, DIRECTOR, FOR
KIRKSVILLE REGIONAL OFFICE, SUED
IN HER OFFICIAL CAPACITY,
MR. THAD TAYLOR, HEARINGS REFEREE,
SUED IN HIS OFFICIAL CAPACITY,
MS. DEBRA WOHLERS, ASST. DIRECTOR
OF HABILITATION, KIRKSVILLE REGIONAL
OFFICE, SUED IN HER OFFICIAL CAPACITY,**

APPELLANTS.

DOCKET NUMBER WD72126

DATE: January 25, 2011

Appeal From:

Macon County Circuit Court
The Honorable Hadley E. Grimm, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh and Gary D. Witt, JudgeS

Attorneys:

Susan K. Eckles, St. Louis, MO and Erica L. Stephens, Jefferson City, MO, for respondent.

Kathleen R. Robertson, Jefferson City, MO, for appellants.

MISSOURI APPELLATE COURT OPINION SUMMARY

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No. WD72126

Macon County

Before Division Three Judges: Cynthia L. Martin, Presiding Judge, James E. Welsh and Gary D. Witt, Judges

Andrea Weisenborn appeals the Missouri Department of Mental Health's decision denying her services under the Comprehensive Medicaid Waiver Program.

Andrea Weisenborn ("Weisenborn") is a twenty-nine year-old woman who was diagnosed with Prader-Willi Syndrome (PWS) with hyperphagia during her first year of life. PWS is a genetic condition that affects brain functioning, body composition, metabolism, and cognitive/behavioral functioning. Hyperphagia causes an almost uncontrollable drive to excessively eat, and as a result, Weisenborn is morbidly obese and diabetic. She also has sleep apnea, cellulitis, blood clots in her legs, psoriasis, and scoliosis. Weisenborn is part of the small subset of those affected by PWS who do *not* test in the range of mental retardation on a standardized IQ test.

Weisenborn began receiving Medicaid Waiver services in 2003. To qualify for services, among other requirements, an applicant must show a significant deficit in at least three of the following six areas: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living or economic self-sufficiency. In

both 2004 and 2006 she was found to have substantial limitations in the requisite number of three areas: self-care, self-direction, and capacity for independent living or economic self-sufficiency. Retested in 2008, Weisenborn was found not to have substantial functional limitations in the area of self-care and was denied services.

Weisenborn appealed and the hearing referee first determined that the Department was incorrect in its denial of services. Upon reconsideration, the hearing officer denied Weisenborn Medicaid Waiver services. The decision of the Referee was affirmed on appeal by the Department Director. That decision was appealed by Weisenborn to the Circuit Court, and the decision of the Director was reversed by the trial court, which held that Weisenborn was eligible for services.

The Department appealed the decision of the trial court; however, in matters of this nature, we review the Department's decision, not the decision of the circuit court. Thus the procedural posture of this case is that Weisenborn is appealing the Department's denial of her benefits.

TRIAL COURT'S REINSTATEMENT OF MEDICAID WAIVER SERVICES AFFIRMED AND REMANDED FOR A DETERMINATION OF REASONABLE COSTS AND ATTORNEYS' FEES

In her sole Point Relied On, Weisenborn argues the Director erred in finding Weisenborn ineligible for Medicaid Waiver services in that the decision is not supported by competent and substantial evidence upon the whole record because the evidence presented at the hearing established that Weisenborn: (1) has substantial functional limitations in three areas of Major Life Activity, and (2) that but for the Medicaid Waiver services, she would require an ICF/MR level of care.

Pursuant to 9 C.S.R. section 45-2.015(1)(C), to qualify for the Comprehensive Medicaid Waiver, one must: (1) be an individual with mental retardation and/or a developmental disability; (2) be Medicaid eligible; and (3) be determined to otherwise require the level of care provided in an ICF/MR.

We find the Department's conclusion that Weisenborn does not have mental retardation is supported by substantial evidence. However, Weisenborn does have a developmental disability. She also has a deficit in three areas because, in addition to the two undisputed deficit areas, Weisenborn does have a deficit in the area of self-care. The Department argues that the major life activity category of "self-care" only pertains to whether an applicant is *able* to do an activity and not whether the applicant has the capability of properly *choosing* to do an activity. We disagree. "Self-care," by definition, contemplates not only mental knowledge and physical ability to complete various tasks but also the mental capacity to be able to appropriately choose to perform such tasks. Therefore, there was substantial evidence that Weisenborn is limited in the area of self-care as there was undisputed evidence that she is incapable of making appropriate choices with respect to food among other tasks.

Finally, the Department had the burden at the underlying hearing to produce evidence to show Weisenborn did not meet the statutory requirements for Medicaid Waiver services. With respect to her requiring an ICF/MR level of care, the Department has failed to meet its burden. The applicant for Medicaid Waiver services must have a need for the level of care provided in an ICF/MR (42 C.F.R. section 440.150), and a determination that but for the waiver, the applicant would be institutionalized in such an institution (42 C.F.R. section 441.302). The Medicaid Waiver program does not require prior institutionalization before one is qualified to receive benefits. However, the fact that Weisenborn had not previously placed in an ICF/MR level of care facility was the sole basis upon which the Department denied that Weisenborn needed this level of care.

The record is unclear as to whether Weisenborn would be institutionalized but for the Medicaid waiver. There is substantial evidence that Weisenborn's PWS requires that she be monitored at all times due to her hyperphagia. Further, the record shows that Weisenborn needs a variety of services with respect to "self-care," which, if not provided, would be severely detrimental to her health and well-being and could result in death. There was substantial evidence that without the services provided by the Department that Weisenborn does indeed need an inpatient level of care. The Department has the burden to show Weisenborn does not qualify for benefits and it has failed to meet that burden.

We affirm the trial court's reinstatement of Medicaid waiver services and remand for a determination of reasonable costs and attorneys' fees.

Opinion by: Gary D. Witt, Judge

January 25, 2011

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